Dutchess Overhead Doors, Inc. *and* Upstate New York Regional Council of Carpenters, International Brotherhood of Carpenters and Joiners of America, AFL–CIO. Case 3–CA–21892

December 20, 2001

DECISION AND ORDER

CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On June 6, 2000, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent and the Charging Party filed exceptions and supporting briefs and the General Counsel, the Respondent, and the Charging Party filed answering briefs.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified and set forth in full below.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Dutchess Overhead Doors, Inc., Poughkeepsie, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Cease and desist from

(a) Failing and refusing to comply with the terms of the Master Agreement between Construction Contractors' Association of Hudson Valley, Inc. and the Upstate Regional Council of Carpenters, International Brotherhood of Carpenters and Joiners of America, AFL–CIO.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Comply with the terms of the Master Agreement between CCA and the Upstate Council and reimburse all employees and/or the Upstate Council for any loss that they suffered from October 19, 1998, to the present time due to the Respondent's failure to comply with the terms of this Agreement, as prescribed *in Ogle Protection Service*, 183 NLRB 682 (1970), with interest computed as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(b) Within 14 days after service by the Region, post at its office in Poughkeepsie, New York, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 19, 1998.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region, attesting to the steps that it has taken to comply with this Decision.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The Charging Party has excepted to the judge's failure to recommend that the remedy be extended prior to October 19, 1998, a date 6 months prior to the filing of the charge herein. However, the General Counsel specifically alleged in the complaint that the Respondent engaged in unlawful activity only "since on or about October 19, 1998," and specifically requested in the complaint that the Respondent be required to make the employees whole for any losses incurred as a result of the Respondent's unlawful activity only "since October 19, 1998." Under these circumstances, we decline to expand the remedy beyond that requested in the complaint. We shall revise the affirmative relief provision to reflect that date.

[3] We shall modify the judge's recommended Order in accordance with our recent decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996); *Excel Container*, 325 NLRB 17 (1977); and *Ferguson Electric Co., Inc.*, 335 NLRB No. 15 (2001).

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. December 20, 2001

Peter J. Hurtgen, Chairman

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to comply with the terms of our contract with Upstate New York Regional Council of Carpenters, International Brotherhood of Carpenters and Joiners of America, AFL–CIO (the Union).

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL reimburse you and the Union for any loss that you suffered since October 19, 1998, that was due to our failure to comply with the terms of our contract with the Union, with interest.

DUTCHESS OVERHEAD DOORS, INC.

Robert Ellison, Esq., for the General Counsel.
Donald Sapir, Esq., for the Respondent.
James LaVaute, Esq, (Blitman & King, L.L.P), for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on December 14 and 15, 1999, in Albany, New York. The complaint, which issued on October 22, 1999, and was based on an unfair labor practice charge that was filed on April 19, 1999, by Upstate New York Regional Counsel of Carpenters, International Brotherhood of Carpenters and Joiners of America, AFL–CIO (the Union and/or the Upstate Council) alleges that Dutchess Overhead Doors, Inc. (the Respondent), violated Section 8(a)(5) of the Act by failing and refusing to apply the terms of the collective-bargaining agreements in effect, including wages and fringe benefits, to all of its unit employees.

FINDINGS OF FACT

I. JURISDICTION

The Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

I find that the Hudson Valley District Council of Carpenters (HVDC and/or the Union) has been a labor organization within the meaning of Section 2(5) of the Act. In about 1998, HVDC was disbanded and all the constituent parts of this organization, with the exception of the Westchester and Rockland locals, became part of the Upstate Council, which I also find has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE FACTS

The Respondent is engaged in the installation and service of residential and commercial garage doors. Commercial jobs range in size from a small automotive shop with 2 doors to a large warehouse with 50 garage doors. Another form of commercial work performed by the Respondent is installing and servicing roll up type doors that secure the front of stores. The residential work is installing and maintaining garage doors at private homes. Respondent also performs service work on both residential and commercial work.

Charles Vealey was the president and executive secretary of HVDC from about 1988 through 1998. Prior to that he was a business representative and trustee of what was then Local No. 255 in Bloomingburgh, New York. HVDC was a party to a "Master Agreement"[5], also called the Commercial Agreement, with Construction Employers of Hudson Valley, Inc. effective from June 1, 1987, to May 31, 1990. About a month after the execution of this agreement, the association's name was changed to Construction Contractor's Association (CCA). The Respondent's president and owner, Daniel Madsen, signed this agreement on November 17, 1987. The next agreement between the HVDC and CCA was effective for the period of June 1, 1990, through May 31, 1994. Madsen signed this agreement on July 12, 1991. The next agreement between HVDC and CCA was effective from 1994 through 1998 and the agreement between the Upstate Council and CCA was effective from June 1, 1999, through May 31, 2002; neither of these agreements was signed by Madsen or anybody else representing the Respondent.

At the same time that Vealey and Madsen signed the 1987 Master Agreement, they also signed the Residential Agreement, a collective-bargaining agreement covering the same period for residential construction in the affected area; the Residential Agreement that followed, which was executed by the Association and the Union and was effective for the period June 1,

[5] The Recognition clause of the Commercial Agreement and the Residential Agreement states inter alia:

> The parties agree that the collective bargaining unit covered by this agreement is a single multi-employer bargaining unit consisting of employers represented by [CCA] that is bound to this agreement, including any individual employers who are not members of [CCA] but who sign the agreement or agree to be bound to it.
>
> The [HVDC] recognizes [CCA] as authorized to act in collective bargaining negotiations for all their members and for non-member employers who agree to this Agreement.

1990, through May 31, 1994, and subsequent Residential Agreements were never signed by the Respondent. The 1987 agreements were 8(f) agreements. The 1990 Master Agreement states:

> The Union has claimed and demonstrated and the Employer is satisfied and acknowledges that the Union represents a majority of the Employers' employees in an appropriate bargaining unit for purposes of collective bargaining. Accordingly, the Union requests recognition under Section 9(a) of the NLRA, and the Employer recognizes the Union as the exclusive bargaining agent under Section 9(a) of the NLRA for all employees within the contractual bargaining unit.

The Master Agreement, defines highway work and piledriver and dockbuilder work and sets forth the wages of the employees covered by the agreement, between $16 and $17 an hour for carpenters in 1987. The Residential Agreement is entitled Collective Bargaining Agreement for Residential Construction. Article Vl of this Agreement states, inter alia:

> This Residential Agreement shall be applicable only to the site construction of all work done by the employer in one family, two family, row housing and garden type homes or apartments which are not more than four stories high and are used as private dwellings.

Article Vl of the Residential Agreement also states, inter alia: "any work which is not specifically set forth in Section number 1 above shall not be covered by and performed pursuant to the standard collective bargaining agreement between the Construction Employers of the Hudson Valley, Inc. and Hudson Valley District Council of Carpenters." The wage rate for carpenters under this agreement for the same period is $9.50 an hour.

Madsen testified that he received a telephone call from Vealey in about October 1987. Vealey asked if he would be interested in being a union contractor. "And we talked and we [sic] stated that it could be possible that we could do the residential work in the counties that were part of the residential agreement." Madsen testified that the wages and benefits that he paid to his employees exceeded the rates set forth in the Residential Agreement, so he saw no problem with signing the agreement and still remaining competitive. In addition:

> There was a conversation about doing commercial work union, and I stated that I just could not do it because our competition was all non-union . . . . I told him that if this covered the commercial work, that we just could not be bound to this because we would not be competitive. And I asked him if this just covered union commercial work and he said no, it covered everything. And I was insistent, I said it just doesn't make sense for our company. And I was told that if I didn't sign this, we couldn't do the residential and I ended up signing.

Vealey testified on rebuttal that he never told Madsen that he did not have to comply with the Master Agreement on any commercial work that he was performing:

> I told him that the Master Agreement applied to all work coming within the jurisdiction of the [HVDC] and that if he was doing any work on any commercial jobs, that the commercial benefits and rates would have to be applied. And if he was doing work on residential jobs, that the residential rates and benefits would be applied. And that those two agreements would be honored.

As stated above, the next agreements between the Union and the Association was effective for the period June 1, 1990 through May 31, 1994. The Respondent signed the Master Agreement for this period, but not the Residential Agreement. Although Madsen's name appears on the signature page, there was a substantial amount of testimony of who signed the agreement, and the circumstances surrounding the signing. What is undisputed is that the Respondent executed this agreement because of its difficulty in purchasing stamps from the Union.

The fringe benefits of the employees covered by these contracts are paid to them in the form of benefit stamps. The employers purchase stamps from the Union, the amount of which is determined by contractual terms and the number of hours the employees worked. These stamps are given to the employees and are redeemed at the Union's benefit office. It is undisputed that during the period of November 1987 through 1994 the Respondent had from two to four employees who were Union members. During this period, the Respondent paid these employees under the terms of the Residential Agreement and purchased special (residential) stamps for them, even when they were performing commercial work.

Madsen testified that in 1991 Nancy Wunderlich, the Respondent's bookkeeper, told him that an employee in the Union's benefit office told her that they could not sell the Respondent stamps because he had not signed the 1990 to 1994 contract. He called Vealey and asked him what was going on. Vealey told him that they couldn't sell him stamps because he had not signed the latest contract. Vealey told Madsen that he would mail the contract to him, that he should sign it, return it to the Union, and then he could purchase stamps. Madsen testified: " At that point, I was leaving for vacation and I told Nancy…go ahead and sign the contract. It should be the same as what we have and get it back so we can get stamps." He left for vacation, Wunderlich signed the contract, returned one to the Union and filed the other; he never saw it until after the unfair labor practices were filed herein. Madsen was asked on direct examination what "kind" of agreement it was that he was speaking to Vealey about. He testified:

> We had a discussion that we were, you know, sending the same, you know, the same agreement that we had before and it had the new rates in it, you know, benefit rates. And I was assuming, you know, that it was the same contract that we had signed before.
>
> Q. And which agreement was that?
> A. The residential.

Shortly thereafter, he again testified. "I just assumed, when I was talking to him, that we were getting a residential agreement. There was no conversation of a master agreement, or a commercial agreement." I then asked him again about his conversation with Vealey:

> Q. Tell me what the discussion was.
> A. The only conversation was—we had was that I was, you know, expecting the same contract that I had before and which would have the same type of stamps that I had before. I mean, there was no conversation that it was going to change.
> Q. What contract was that?

A. The Residential Agreement.

When I asked Madsen for more specifics in his conversation with Vealey, he testified:

> I called to ask, you know, why we couldn't buy the stamps and why we hadn't received the contract. And, I was not going to be in town, put it in the—put the new residential contract in the mail to me, that's what I was assuming I was getting, and instructed my bookkeeper to sign the contract when we received it.

I then asked him if his best recollection was that he asked Vealey to send him the contract, or to send him the residential contract. He answered: "My best recollection is to send me the new residential contract." Wunderlich has been employed by the Respondent as a Bookkeeper for twelve years; one aspect of her job is to purchase and distribute the stamps. She determines the amount of stamps to be purchased, completes the Union's stamp order form, makes out a check and remits these items to the Union's benefit fund. When she receives the stamps from the benefit fund, she distributes them to the Union employees. In 1991 the Union told her that they could not sell her stamps because Madsen had not signed the new contract. She told Madsen of this problem and shortly thereafter, he told her that a contract would be coming in the mail, but as he was leaving for vacation, she should sign his name to the contract, and return it to the Union. Shortly thereafter, she received the contract, signed Madsen's name and mailed it back to the Union. After that, she resumed purchasing stamps from the benefit fund. During her employment with the Respondent, she never purchased commercial stamps.

Vealey testified on rebuttal that in their conversation in 1991, Madsen complained that he was not able to purchase stamps. Vealey told him that the reason was that he had not signed the 1990 contract. During this conversation, Madsen never said that he was expecting the residential agreement. "It was just basically the commercial agreement, the master agreement." He testified:

> A. I said that I would mail them out to his office. I thought he was going to be signing them. I don't recall him saying that he was going to be on vacation . . . But he could have said that. But he said that he would get them signed and get them back to me.
>
> Q. When you say them, are you talking about more than one?
>
> A. No. I'm talking about the master agreement. We mailed out two agreements, one for the contractor and one…to be returned to the Union.
>
> Q. When you say two agreements, you mean two copies of the master agreement?
>
> A. Yes.

Vealey mailed the 1990–1994 Master Agreement to the Respondent and it was returned to the Union, signed, about 10 days later.

Madsen testified that from 1987 to the present time, about 25 percent of the Respondent's business was commercial work, 50 to 55 percent was residential work, and the rest was service work. It is undisputed that the Respondent never purchased commercial stamps for its employees even when they performed commercial work, and never paid its employees the commercial rates specified in the Master Agreement even when they performed commercial work.

Madsen testified to the commercial jobs that the Respondent performed between 1990 and 1998 that he could recollect. The Baxter Pharmaceutical job, lasting about 3 weeks, involved about 60 doors and the Caldor's job, which lasted about 2 weeks, had between 60 and 70 doors. In addition, during this period the Respondent worked two projects for the Middletown School District, a couple of projects for the Newburgh School District and jobs for the Walden, Maybrook, Swan Lake, (which involved six to eight doors), Kingston, and Middle Hope Fire Departments; also, a Federal Express Facility and a mail facility at Stewart Airport in Newburgh, New York. In addition, it performed work for the Marlborough School system, a couple of jobs for Frank Rome & Son in Kingston, New York, a job for Middletown GMC, and a job for New York Department of Transportation in Monroe, New York.

Anticipating the Respondent's defense, the Union defends that because of the large geographical area that it covers, and its limited resources, it was difficult to police employer compliance with its contracts. From about 1987 through 1997, the geographic territory of the Union encompassed nine counties in Central New York State west of the Hudson River. In addition, HVDC has approximately 1000 members and 200 employers under contract. During this period, the Union employed three agents, one for each local. If a job being performed within the Union's jurisdiction is big enough, or if the general contractor or project manager has a contract with the Union, the Union will appoint a shop steward to cover the project. One responsibility of the shop steward is to report on the employers' compliance with the contractual requirements.

There are six delegates from each of the constituent locals of HVDC and they meet once a month where they discuss union business. During these meetings, the business representatives of the local Unions report on what is occurring in each local's area. At local union meetings, which usually take place monthly, the business representatives notify the member of the activities in the area, including jobs that are being performed within the local union's jurisdiction.

The Master Agreement provided for an exclusive hiring hall provision which required the employers to obtain employees through the constituent union offices. If the Unions are unable to provide employees within 48 hours, the employer may employ employees directly. Vealey testified that at the Caldor job being performed by the Respondent in about 1992, he received a call from the Respondent saying that they needed one employee and he sent one employee to the job. The Respondent was at that job for about 2 weeks.

Finally, the Respondent defends that it was not obligated to conform to the requirements of these contracts within the 10(b) period, because it had withdrawn from membership in the CCA. As stated supra, the most recent Master Agreement between CCA and the Upstate Council is effective for the period June 1, 1999, through May 31, 2002. Jeffrey Murray, the director of organizing for the Upstate Council, testified that negotiations for this agreement between he and Richard O'Bern, the representative of CCA, commenced in September 1998. He and O'Bern met on about 15 to 30 occasions between that time and sometime prior to May 31, 1999, when agreement was reached on all issues. He testified further that between September 1998 and February 1999 there were about seven to ten negotiating sessions where he and O'Bern exchanged propos-

als. By letter dated March 17, 1999, the Respondent wrote to the CCA, with a copy to HVDC:

> This letter is to advise you that in the event and to the extent the Construction Contractors Association of the Hudson Valley, Inc. (the "Association") and/or the Hudson Valley District Council of Carpenters (the "District Council") and/or the Upstate New York Regional Council of Carpenters (the "Regional Council") consider Dutchess Overhead Doors, Inc., ("Dutchess") to be a member of the Association and/or a member of a single multi-employer bargaining unit whose employees are represented by the District Council and/or the Regional Council, Dutchess hereby denies such membership and withdraws its purported membership both from the Association and the single multi-employer bargaining unit, effective immediately.

On March 31, 1999, the Respondent filed an RM petition with the Board, which was subsequently dismissed. Charles Vealey III, a Council Representative for the Upstate Council, testified that in June 1999, after the new contract had been agreed to, he sent a notice out to all active contractors, which would include the Respondent, notifying them of the changes contained in the new contract.

IV. ANALYSIS

The Respondent initially defends that it withdrew from the Association and Association wide bargaining on March 17, 1999, and therefore was not bound to the terms of the Master Agreement effective June 1, 1999. There is no question that the Respondent was bound to the terms of the 1987 agreements and all successive agreements absent timely notice otherwise. The 1987 and 1990 agreements both state that the employer recognizes the Union as the collective-bargaining representative of its employees and that the contract is an association-wide agreement and that all members are bound to the agreement "including any individual employers who are not members of [CCA] but who sign the agreement and agree to be bound to it." The only way for the Respondent (or any employer in its situation or who were association members) to avoid this obligation is to withdraw from this obligation or from the association in a timely manner. I find that the Respondent has failed to do so herein.

The Supreme Court in *Charles D. Bonanno Linen Service v. NLR.B,* 454 U.S. 404, 410–411 (1982), stated:

> But in *Retail Associates, Inc.*, 120 NLRB 388, the Board announced guidelines for withdrawal from multiemployer units. These rules, which reflect an increasing emphasis on the stability of multiemployer units, permit any party to withdraw prior to the date set for negotiation of a new contract or the date on which negotiations actually begin, provided that adequate notice is given. Once negotiations for a new contract have commenced, however, withdrawal is permitted only if there is "mutual consent" or "unusual circumstances" exist. *Id.*, at 395.
>
> The Board's approach in *Retail Associates* has been accepted in the courts, as have its decisions that unusual circumstances will be found where an employer is subject to extreme financial pressures or where a bargaining unit has become substantially fragmented.

The parties began negotiations for a new contract in November 1998 and didn't conclude until May 31, 1999. At the time of the Respondent's attempted withdrawal the parties had met on from 7 to 10 occasions. Respondent's attempted withdrawal was therefore untimely. As there is no mutual consent or unusual circumstances herein, the Respondent's attempted withdrawal on March 17, 1999, was unsuccessful.

Respondent also defends that it was not bound by the terms of the 1990 Master Agreement because when it signed this contract in 1991, it believed that the contract that it would be receiving was the Residential Agreement, not the Commercial Agreement. The sole basis for this defense is Madsen's testimony about his conversation or conversations with Vealey in about July 1991. Madsen's testimony was not consistent about this subject. Initially he testified that the contract that he expected to receive from Vealey was the same contract that he had signed before. Then he testified that he assumed that he would be receiving the Residential Agreement, and finally, he testified that his best recollection was that he told Vealey to send him the Residential Agreement. I do not credit this testimony. Initially, I found Vealey to be a more credible witness than Madsen. Additionally, I find it highly unlikely that Vealey would agree to send him the Residential Agreement with a wage rate of about half of the Commercial Agreement, especially considering their discussion in November 1987 when Vealey insisted that Madsen had to sign the Master Agreement. Although I have rejected this defense on credibility grounds, more importantly I reject it because Madsen's testimony is, as it turns out, inadmissable as parol evidence. *Sansla, Inc*., 323 NLRB 107, 109 (1997), states: "The Board has consistently refused to allow a party to use parol evidence of an alleged oral agreement to vary the terms of a written agreement." See 30 Am. Jur. 2d Sec. 1016 (1967). An exception to this rule was set forth in *RPM Products*, 217 NLRB 855 (1975), where the Board stated, in discussing an alleged contract: " sufficient ambiguity exists as to the scope of the unit covered to justify resort to parol evidence." The terms of the Master Agreement leaves no doubt that it applies to commercial jobs, while the corresponding terms of the Residential Agreement clearly refer to small residential jobs. Although the facts herein do not present a "classic" parol evidence situation, I find that the lack of ambiguity in the 1987 and 1990 contracts dictates against accepting any evidence to vary the contract, or the terms of the contract that Madsen was to receive.

The Respondent's principal defense herein is that the Complaint should be dismissed pursuant to Section 10(b) of the Act because the Union knew, or should have known that the Respondent was not complying with the terms of the Master Agreement more than 6 months prior to the filing of the unfair labor practice charge. However, because the Respondent did not plead this defense in its answer, nor did it litigate it at the hearing, this defense must be rejected. The law is clear that Section 10(b) is an affirmative defense, and if it is not timely raised, it is waived. *McKesson Drug Co.*, 257 NLRB 468 fn. 1 (1981); *DTR Industries*, 311 NLRB 833 fn. 1 (1993).

In the alternative, and if the Respondent had properly plead Section 10(b), I would still find that this was not a valid defense herein. The burden of showing that the Charging Party knew, or should have known that the Respondent was not complying with the contract rests on the party raising the Section 10(b) affirmative defense. *Leach Corp*., 312 NLRB 990, 991 (1993). In these situations:

> [The] Respondent would have to show, at the very least, either that the Union knew, more than six months before filing

its charge, that Respondent was dishonoring the bargaining agreements, or that in the exercise of reasonable diligence the Union should have known this more than 6 months before filing the charge.

SAS Electrical Services, Inc., 323 NLRB 1239, 1253 (1997). Stated another way, Section 10(b) does not start to run until the aggrieved party has received actual or constructive notice of the conduct constituting the alleged unfair labor practice. *P & C Lighting Center*, 301 NLRB 828 (1991). I have found Vealey to be an extremely credible witness and I credit his testimony that the Union was unaware that the Respondent was not paying employees who performed commercial work at the commercial rate, and was not purchasing commercial stamps for these employees. I also find that the Respondent has not satisfied its burden of establishing that the Union should have been aware of this. The Union has approximately 1000 members and 200 employers under contract; 2 to 4 of these members were employed by the Respondent. In addition, it was only the wages and benefit portions of the contract that the Respondent was not honoring. The Union would have no way of knowing that the Respondent was not paying its employees the commercial rate for commercial work unless the employees notified the Union of the discrepancy, which, apparently, they did not do. Further, absent a request by the employees, I would not expect Vealey, or the Union's three agents, to examine the benefit office records to ascertain whether the proper stamps were purchased. I therefore find that even if Section 10(b) had been properly plead, I would have dismissed this defense.

CONCLUSIONS OF LAW

1. The Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Hudson Valley District Council of Carpenters and the Union have each been labor organizations within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(5) of the Act by not complying with the terms of its contract with the Union.

THE REMEDY

Having found that the Respondent has violated Section 8(a)(5) of the Act, I shall recommend that it cease and desist from failing to apply the terms of the latest Master Agreement regarding the wages and fringe benefits of its employees. I recommend that it be ordered to comply with the terms of the Master Agreement including, inter alia, the provisions relating to rates of pay and fringe benefits. I shall also recommend that the Respondent be ordered to make whole its employees for any loss of earnings or other benefits that resulted from the Respondent's failure to comply with these provisions of the Master Agreement from October 19, 1998, to the present time. If any employee suffered any expenses that it would not have suffered but for the Respondent's failure to comply with the provisions of the Master Agreement (for example if the Union canceled employees' medical coverage as a result of the Respondent's actions and the employee had unreimbursed medical expenses) the Respondent shall reimburse the employees for such expenses. In addition, if the Respondent's actions resulted in the Union and/or HVDC losing initiation fees or dues, the Respondent shall make them whole for that loss.

On these findings of fact, conclusions of law and on the entire record, I issue the following recommended.[2]

ORDER

The Respondent, Dutchess Overhead Doors, Inc., Poughkeepsie, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to comply with the terms of the Master Agreement between Construction Contractors' Association of Hudson Valley, Inc. and the Upstate Regional Council of Carpenters, International Brotherhood of Carpenters and Joiners of America, AFL–CIO.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Comply with the terms of the Master Agreement between CCA and the Upstate Council and reimburse all employees and/or the Upstate Council for any loss that they suffered from October 19, 1998, to the present time due to the Respondent's failure to comply with the terms of this Agreement.

(b) Within 14 days after service by the Region, post at its office in Poughkeepsie, New York, a copy of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region, attesting to the steps that it has taken to comply with this decision.

Dated, Washington, D.C. June 6, 2000

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT fail and refuse to comply with the terms of our contract with Upstate New York Regional Council of Carpenters, International Brotherhood of Carpenters and Joiners of America, AFL–CIO (the Union).

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed them by Section 7 of the Act.

WE WILL reimburse our employees and the Union for any loss that they suffered since October 19, 1998, that was due to our failure to comply with the terms of our contract with the Union.

DUTCHESS OVERHEAD DOORS, INC.